TAN KOK CHENG & SONS REALTY CO. SDN. BHD. *a*

v.

LIM AH PAT T/A JUTA BENA

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' ANUAR BIN HJ. ZAINAL ABIDIN CJ (MALAYA) *b*
DATO' WAN ADNAN ISMAIL FCJ
TUAN GOPAL SRI RAM JCA
[CIVIL APPEAL NO. 02-212-93]
21 SEPTEMBER 1995

ARBITRATION: *Contract - Disputes - Settlement by arbitration - Stay of action pending arbitration of dispute - Section 6 Arbitration Act 1952 - Whether dispute must be bona fide - Trial Judge refusing stay for absence of bona fide dispute - Whether wrong test applied - Proper approach to be taken by Courts.* *c*

CONTRACT: *Building contract - Arbitration clause - Institution of suit in breach of arbitration clause - Whether allowed - Whether a matter of Court's discretion - Prerequisites for exercise of discretion.* *d*

By a contract in writing executed in 1984, the appellant engaged the respondent as its contractor to construct certain buildings in Petaling Jaya. By clause 43 of the contract the parties agreed to arbitrate certain disputes that might arise between them in respect of the contract work. While work was in progress, two interim certificates of payment were disputed *e* by the appellant, and in the upshot, they refused to honour the same. The result was that the respondent stopped work, withdrew all his workforce from the work site, and thereafter sued the appellant for the sum due on the certificates amounting to some RM730,000. The appellant took out a summons to stay the action, arguing that under clause 43 the respondent was obliged to put the dispute to arbitration. The learned Registrar dismissed the summons, and on appeal, the decision was affirmed by the learned Judge. In his ruling, the learned *f* Judge took the view that "*only bona fide disputes call for settlement by arbitration*", and that there was no such dispute here as dispute means *"not just differences arising out of a party's refusal to do something but controversy over contestable matters"*. The appellant appealed and before the Court of Appeal, the primary issues that arose were:

1. Whether the learned Judge had applied the wrong test when he held that only *bona fide* disputes call for arbitration. *g*

2. Whether the learned Judge's decision was flawed by reason that there had been insufficient judicial appreciation of the affidavit evidence delivered by the parties.

Held: *h*

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of *i* the contract to arbitrate. However, as evinced by s. 6 of the Arbitration Act 1952, the Court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation to go to arbitration that he had voluntarily undertaken.

[2] There are several pre-requisites that need to be met before a Court may begin the exercise of discretion conferred upon it by s. 6. One of them, relevant to the instant case, is that, there must be a dispute or a difference falling within the arbitration clause in question. In the absence of such dispute, no question of stay can arise.

[3] However, contrary to what the trial Judge had expounded, there is no requirement that the dispute or difference should be *bona fide* in order for a defendant to move the Court under s. 6 of the Act. The added condition that a dispute must be *bona fide* in order for a stay to be granted would take the Court into an exercise that *ex necessitae rei*, involves a critical examination of the merits of the claim. Such an exercise is not contemplated by the Act and is outside the parameters of the Court's function under s. 6. Given an agreement to arbitrate and the satisfaction of the conditions set out in s. 6 of the Act, the correct approach is for the Court to grant a stay.

[4] In the circumstances, when considering an application under s. 6 of the Act, it is no part of the Court's function to decide whether the defendant has raised a *bona fide* dispute warranting a stay. The strength and weakness of the issue raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences.

[5] There was abundant evidence before the learned Judge disclosing a dispute upon the issues raised by the appellant. Clearly there was lacking in this case a proper appreciation by the Judge of the affidavit evidence on the issues. The learned Judge applied the wrong test and asked himself the wrong question when he held that there was no *bona fide* dispute between the parties. The learned Judge also went too far and was clearly wrong when he held that there must be a *bona fide* dispute for s. 6 to operate. A dispute or difference, whether *bona fide* or not, would suffice.

[Appeal allowed. Order of Judge below set aside].

***[Bahasa Malaysia** Translation of Headnotes]*

***TIMBANGTARA:** Kontrak - Pertikaian - Penyelesaian melalui timbangtara - Penggantungan tindakan sementara menantikan timbangtara pertikaian - Seksyen 6 Akta Timbangtara 1952 - Samada pertikaian seharusnya bona fide - Hakim perbicaraan menolak penggantungan kerana ketiadaan pertikaian bona fide - Samada ujian yang salah terpakai - Pendekatan yang wajar hendaklah diambil oleh Mahkamah.*

***KONTRAK:** Kontrak bangunan - Fasal timbangtara - Permulaan guaman dalam kemungkiran fasal timbangtara - Samada dibenarkan - Samada merupakan hal-perkara budibicara Mahkamah - Prasyarat bagi mempergunakan budibicara.*

Melalui satu kontrak bertulis yang telah disempurnakan dalam tahun 1984, perayu telah mengguna-khidmat responden sebagai kontraktornya untuk membina beberapa buah bangunan yang tertentu di Petaling Jaya. Melalui fasal 43, kontrak tersebut pihak-pihak telah bersetuju untuk menimbangtara beberapa pertikaian yang tertentu yang mungkin berbangkit di antara mereka berhubung kerja-kerja kontrak tersebut. Ketika kerja-kerja sedang dijalankan dua sijil interim pembayaran telah dipertikaikan oleh perayu, dan dalam perbalahan itu, mereka telah enggan untuk mematuhinya. Akibatnya, responden telah memberhentikan kerja, menarik-balik atau memindahkan kesemua tenaga kerjanya daripada tapak kerja, dan selepas itu mendakwa perayu bagi jumlah yang kena dibayar pada sijil-sijil tersebut, yang berjumlah lebih kurang RM730,000. Perayu telah mengeluarkan saman untuk menggantung tindakan tersebut, dengan

hujahan bahawa dibawah fasal 43 responden adalah diwajibkan untuk mengemukakan pertikaian itu kepada timbangtara. Pendaftar yang bijaksana telah menolak saman tersebut, dan di atas rayuan, keputusan itu telah diikrarkan oleh Hakim yang bijaksana. Dalam keputusannya, Hakim yang bijaksana berpendapat bahawa "*only bona fide disputes call for settlement by arbitration*" (hanya pertikaian *bona fide* sahaja yang menghendakkan penyelesaian melalui timbangtara), dan bahawa tidak terdapatnya pertikaian yang sedemikian di sini kerana pertikaian bermakna, "*not just differences arising out of a party's refusal to do something but controversy over contestable matters*" (bukan sahaja perbezaan perkara yang berbangkit dari keengganan satu pihak untuk melakukan sesuatu perkara tetapi merupakan kontroversi ke atas perkara-perkara yang boleh dipertengkarkan). Perayu telah merayu dan di hadapan Mahkamah Rayuan, isu-isu utama yang telah berbangkit adalah:

(1) Samada Hakim yang bijaksana telah memakai ujian yang salah bilamana beliau memutuskan bahawa hanya pertikaian-pertikaian *bona fide* sahaja yang menghendakkan timbangtara.

(2) Samada keputusan Hakim yang bijaksana tidak sempurna kerana tidak terdapatnya penghargaan kehakiman yang mencukupi terhadap keterangan afidavit yang disampaikan oleh pihak-pihak.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Berdasarkan common law, perjanjian terdahulu antara pihak-pihak yang berkontrak itu untuk merujuk pertikaian mereka kepada timbangtara tidak beroperasi bagi menghalang mana-mana satu dari mereka daripada memulakan prosiding-prosiding di Mahkamah. Fasal yang sedemikian juga tidak mencegah Mahkamah daripada mengendalikan guaman yang difailkan dalam kemungkiran kontrak tersebut untuk ditimbangtara. Walaubagaimanapun sepertimana yang ditunjukkan oleh s. 6 Akta Timbangtara 1952, Mahkamah boleh, dalam mempergunakan budibicaranya, menggantung sesuatu tindakan dan menghendaki plaintif mematuhi kewajipan untuk pergi kepada timbangtara yang mana beliau telah secara sukarela laksanakan.

[2] Terdapat beberapa syarat mutlak yang perlu dipenuhi sebelum Mahkamah boleh bermula untuk mempergunakan budibicara yang dikurniakan ke atasnya oleh s. 6. Salah satu daripadanya, yang relevan dengan kes semasa ini, adalah bahawa, haruslah terdapat satu pertikaian atau suatu perbezaan pendapat yang tergolong dalam fasal timbangtara yang dipersoalkan. Dalam ketiadaan pertikaian yang sedemikian, tidak timbul persoalan penggantungan.

[3] Walaubagaimanapun, bertentang dengan apa yang telah dijelaskan oleh Hakim perbicaraan, tidak terdapat kehendak atau syarat bahawa pertikaian atau perbezaan pendapat tersebut haruslah *bona fide* bagi defendan mengusul Mahkamah di bawah s. 6 Akta tersebut. Syarat tambahan bahawa sesuatu pertikaian haruslah *bona fide* untuk mendapatkan penggantungan akan membawa Mahkamah kepada suatu perlaksanaan yang *ex neccessitae rei*, melibatkan pemeriksaan kritikal merit-merit tuntutan tersebut. Perlaksanaan yang sedemikian tidak diniatkan oleh Akta dan adalah diluar bidangkuasa fungsi Mahkamah di bawah s. 6. Dengan adanya satu perjanjian untuk ditimbangtara dan penyempurnaan syarat-syarat yang dibentangkan dalam s. 6 Akta tersebut, pendekatan yang betul adalah bagi Mahkamah memberikan penggantungan.

[4] Dalam keadaan yang sedemikian, bilamana menimbangkan sesuatu permohonan di bawah s. 6 Akta ianya tidak merupakan fungsi Mahkamah untuk memutuskan samada defendan telah membangkitkan pertikaian yang *bona fide* yang mewajarkan suatu penggantungan. Keteguhan dan kelemahan isu yang dibangkitkan oleh defendan haruslah menunggu keputusan tribunal khususnya yang dipilih oleh pihak-pihak untuk memutuskan perbezaan tersebut.

[5] Terdapat keterangan yang banyak di hadapan Hakim yang bijaksana yang mendedahkan satu pertikaian ke atas isu-isu yang dibangkitkan oleh perayu. Jelas dalam kes ini tidak terdapat penghargaan yang wajar oleh Hakim terhadap keterangan afidavit ke atas isu-isu tersebut. Hakim yang bijaksana telah mengenakan ujian yang salah dan menanyakan dirinya persoalan yang salah bilamana beliau memutuskan bahawa tidak terdapat pertikaian *bona fide* antara pihak-pihak tersebut. Hakim yang bijaksana juga telah terkeluar jauh dan adalah jelas salah bilamana beliau memutuskan bahawa mestinya terdapat pertikaian yang *bona fide* bagi s. 6 beroperasi. Suatu pertikaian atau perbezaan, samada *bona fide* ataupun tidak, adalah mencukupi.

[Rayuan dibenarkan. Perintah Hakim di bawah diketepikan].

Cases referred to:

Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97 ***(refd)***

Inter Maritime Management Sdn. Bhd. v. Kai Tai Timber Co. Ltd., Hong Kong [1995] 1 MLJ 322 ***(foll)***

Dobbs v. National Bank of Australasia Ltd. [1935] 53 CLR 643 ***(foll)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd. [1991] 3 MLJ 309 ***(refd)***

Union of India v. Birla Cotton Spinning & Weaving Mills Ltd. AIR [1967] SC 688 ***(refd)***

Gaya Electric Supply Co. Ltd. v. State of Bihar AIR [1953] SC 182 ***(foll)***

Malaysia Government Officers' Cooperative Housing Society Ltd. v. United Asia Investment Ltd. & Ors. [1972] 1 MLJ 113 ***(refd)***

Legislation referred to:

Arbitration Act, 1952, s. 6

For the appellant - Zainur Zakaria; M/s. Zainur Zakaria & Co.
For the respondent - Premalatha; M/s. Vincent Lim & Teoh

JUDGMENT

Gopal Sri Ram JCA:

This appeal is directed against the order of the High Court at Shah Alam refusing an application by the appellant to stay the suit brought by the respondent on the sole ground that the parties had agreed to arbitrate their differences. The matter arose in this way.

The respondent is a building contractor. By a contract in writing dated 15 June 1984, the appellant engaged the respondent, to construct a four storey office building, a factory and a warehouse on a site in Petaling Jaya. The value of the contract was in the region of approximately RM7.4 million. The contract housed an arbitration clause which may quite safely be described as a legal grammarian's nightmare. It is clause 43 of the contract and reads as follows:

> 43. Provided always that in case any dispute or difference except a dispute or difference as to rates of wages or conditions of employment of workmen employed by the contractor in and for the performance of this contract including workmen employed by nominated subcontractors and by authorised sub-contractors engaged directly by the contractor shall arise

between the employer or the superintending officer on its behalf and the contractor, either during the progress or after completion of the works or after the determination, abandonment, or breach of the contract as to the construction of the contract or as to any matter or thing arising thereunder, or as to the withholding by the superintending officer of any certificate to which the contractor may claim to be entitled, then the superintending officer shall determine such dispute or difference by a written decision given to the contractor. The said decision shall be final and binding on the parties unless the contractor within 14 days of the receipt thereof by written notice to the superintending officer disputes the same, in which case or in case the superintending officer for 14 days after a written request to him by the contractor fails to give a decision as aforesaid, such dispute or difference shall be referred to the arbitration and final decision of a person nominated and appointed by agreement between the superintending officer and the contractor or in event of his death or unwillingness or inability to act or if the superintending officer and contractor fail to agree, of an arbitrator nominated by the chief execution officer of the employer providing the funds for this contract and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificates, shall not be commenced until after the completion or alleged completion of the works, unless with the written consent of the superintending officer and the contractor. The arbitrator shall, have power to review and revise any certificate opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given. Upon every or any such reference the costs of and incidental to the reference and award shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Enactment.

Work commenced under the contract and, from time to time, interim certificates of payment were issued by the certifying authority nominated under the contract. The appellant honoured some of these certificates. Later, it refused to make payment on two certificates. The respondent then ceased work.

Each side contended that the other had repudiated the contract. The appellant claimed that it was entitled to liquidated and ascertained damages from the respondent because, *inter alia*, he wrongly stopped work. The respondent says that it was not paid its dues and was therefore justified in stopping work. He says that the refusal by the appellant to pay on the certificates amounts to a breach that went to the root of the contract, entitling him to withdraw his work-force and machinery. On 30 July 1990, the respondent issued writ claiming a sum of about RM730,000 due on the two certificates in question. He moved for summary judgment. In the meantime, the appellant took out a summons to stay the action. It relied on the arbitration clause to which we have referred. The application went before the Senior Assistant Registrar who, after hearing argument, dismissed the summons. The appellant then appealed to the Judge in Chambers. Although termed an appeal, it is in reality a rehearing of the summons. The Judge deals with the matter as if it were coming before him for the first time: he is unfettered by the decision of the Registrar. See *Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97, 105-107.

In this case, the Judge did precisely that. He came to the conclusion that there was no *bona fide* dispute between the parties and that therefore the arbitration clause did not operate. This is what he said in his written judgment:

The only question to be considered is whether the claim by the plaintiff against the defendants falls within the meaning of clause 43 of the agreement.

I am of the view that only *bona fide* disputes call for settlement by arbitration and I was satisfied that the defendant had not made out a case to show that a *bona fide* dispute existed. I am fortified in my finding by the decision of the Supreme Court in *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.* [1991] 3 MLJ 309 wherein Hashim Yeop Sani, CJ (as he then was) at p. 314G:

> To summarize, once the party asking for the stay has satisfied the Court that there is a dispute, difference or question between the parties within the meaning of the arbitration clause then it is a question of exercising the discretion to grant or not to grant the stay.
>
> I further held that the defendants had not shown that they had denied all the sums were not owing by them. In none of the affidavits filed on behalf of the defendants, had they spelled out the dispute or denied the amount owing to the plaintiff. I am of the view when an amount claimed is not denied it does not call for reference to arbitration on the true construction of clause 43. **Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters**. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum S.E. Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd.* [1986] 1 MLJ 177 and *KSM Insurance Bhd v. Ong Ah Ba & Anor.* [1986] 1 MLJ 237, both decisions by George J.
>
> Cik K. Prema, Counsel for the plaintiff, cited the letter of the defendants to the plaintiff (exhibit TEC 5 in enclosure 16) and submitted that the defendants have admitted the amount shown owing by the defendants to the plaintiff.
>
> I am of the view that when a claim is admitted it does not call for arbitration. When the amount owing is admitted there is no dispute to be referred to arbitration. This is just a mere refusal to pay. (Emphasis added.)

Encik Zainur Zakaria who appeared for the appellant before us criticized the conclusions of the learned Judge on the principal ground that there had been insufficient judicial appreciation of the affidavit evidence delivered by the parties. Counsel submitted that when a careful analysis of the printed evidence is undertaken, it discloses, in the words of clause 43, a "dispute or difference" between the parties to the contract on at least three matters.

These are as follows:

(1) Whether the appellant was justified in deducting liquidated and ascertained damages under the contract from the sums claimed by the respondent;

(2) Whether the abandonment of works by the respondent amounted to a breach of contract; and

(3) Whether the variation orders had been properly issued.

Counsel further submitted that these issues plainly fell within the scope of the widely drafted arbitration clause in this case so that discretion ought, in the ordinary way, to have been exercised in favour of staying the action with a view of allowing the parties to proceed to arbitration.

While recognising the strength of Counsel's arguments in the factual context of this particular case, we are of opinion that those passages in the judgment of the learned Judge upon which we have placed emphasis raise wider issues, both of policy and principle, concerning the power of the Court to stay proceedings on the ground that the parties to a litigation had previously agreed to arbitrate. These are important matters. In order to fully appreciate them

it is necessary to examine and review the relevant principles governing a case such as the present and to decide whether the current policy upon the subject under discussion should be modified, and if so, to what extent.

At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary Courts. Neither did such a clause preclude the Court from entertaining a suit filed in breach of the contract to arbitrate. However, the Court could, in the exercise of its discretion stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a Court which has none, there can be no consensual ousting of a Court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn. Bhd. v. Kai Tai Timber Co. Ltd., Hong Kong* [1995] 1 MLJ 322.

In *Dobbs v. National Bank of Australasia Ltd.* [1935] 53 CLR 643, 652, the High Court of Australia explained the common law position in words that merit recollection:

> What no contract can do is to take from a party to whom a right actually accrues, whether *ex contractu* or otherwise, his power of invoking the jurisdiction of the Courts to enforce it. *(Kill v Hollister* [1746] 1 Wils 129); *Thompson v. Charnock* (101 ER 1310); *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478.) Accordingly, a contract providing for arbitration did not apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer. *(In re Smith & Service and Nelson & Sons* [I890] 25 QBD 545 at p. 544, per Bowen LJ.) But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action.

Legislative intervention in this area of commercial law was inevitable. Indeed, it has helped place the law upon the subject on a proper footing. It took the form of what is now s. 6 of the Arbitration Act, 1952 ("the Act"). That section reads as follows:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

There are several pre-requisites that need to be met before a Court may begin the exercise of discretion conferred upon it by the section. We are here concerned with only one of them. It is the requirement that there must be a dispute or a difference falling within an arbitration clause in any given case. Absent a dispute or difference contemplated by the particular clause, no question of a stay can arise. But, as may be seen from a reading of the section, this is not a statutory postulate.

In *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn. Bhd.* [1991] 3 MLJ 309, Hashim Yeop Sani CJ (Malaya) explained the nature of the requirement now under

consideration in language the clarity of which is usually associated with that very learned Judge. This is what he said:

> In our view the absence of a developed or fully blown dispute or difference at the date of the issue of the writ is not a ground for refusing stay, if the Court finds there is a dispute or difference, for to hold otherwise would encourage a claimant who was subject to an arbitration agreement but who did not wish to go to arbitration to rush to Court at an early stage in order to defeat the arbitration agreement.
>
> Once it is established that there has arisen a dispute or difference or question, the language of s. 6 of the Act 1950 places on the plaintiff the burden to show that it ought not to be referred to arbitration. As correctly stated by the learned Judge, the fact that there is apparent weakness in the respondent's case should not be taken as an excuse to brush aside an arbitration clause to which the appellant was a party and which was being insisted on by the respondent.

The law reports are replete with cases in which Courts have refused a stay on the ground that no dispute or difference as contemplated by the particular arbitration clause in those cases has arisen. Some of these appear in the judgment of the learned Judge. The rationale of those cases may be summed up in the words of Shah J, in *Union of India v. Birla Cotton Spinning & Weaving Mills Ltd.* AIR [1967] SC 688, no doubt spoken in another factual context:

> But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. **It is a case in which in substance there is no dispute between the parties 'under', 'in connection with', or even 'with regard to' the contract.** The plea raised by the Union for stay, of the suit was frivolous." (Emphasis added.)

From a reading of the authorities we are unable to discern any requirement that the dispute or difference should be *bona fide* - the adjective used by the learned Judge to describe the nature of a dispute entitling a defendant in a suit to move a Court under s. 6 of the Act. It is therefore necessary for us to decide whether this added requirement should be imposed upon a party who seeks to stay an action under s. 6 of the Act.

We apprehend that there are two courses open to us in this matter. The first is to interpret the words "sufficient reason" appearing in s. 6 of the Act as imposing a very light burden on a plaintiff to show that the action should proceed. This may be achieved by placing little weight on the agreement to arbitrate and by recognising an untrammeled discretion in the Court hearing an application for a stay. One may, for instance, be prepared to uphold the exercise of discretion by a Judge that there is no *bona fide* dispute. This course is, however, fraught with danger. There is the danger that it may entitle a party to a contract to disregard an obligation he had willingly undertaken.

Further, the added condition that a dispute must be *bona fide* in order for a stay to be granted would take the Court into an exercise that *ex necessitae rei* involves a critical examination of the merits of the claim. Such an exercise is not contemplated by the Act and is certainly outside the parameters of the Court's function under s. 6.

In *Gaya Electric Supply Co. Ltd. v. State of Bihar* AIR [1953] SC 182, 185 Mahajan J explained the role of a Court faced with an application for a stay of proceedings under the Indian equivalent of s. 6 of the Act in a passage that merits reproduction:

> Now this is the very point which would be in issue in the suit itself, and the learned Judge was in error in considering and deciding this point in this enquiry under s. 34. **The validity of the plaintiffs' contention in the suit cannot be gone into by that Court exercising jurisdiction under this section as its function is a very limited one**. The only point in such cases to be decided is whether the claim which is brought - whether it is good, bad or indifferent - comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiffs claim was frivolous and vexatious, but those considerations, as pointed out by Bankes LJ in *Monro v. Bognor Urban Council,* [1915] 3 KB 167 (B), are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint. (Emphasis added.)

We would respectfully adopt these views as our own and merely add that the observations made by Mahajan J apply with equal force to a defendant. When considering an application under s. 6 of the Act, it is no part of the Court's function to decide whether the defendant has raised a *bona fide* dispute warranting a stay. The strength or weakness "of the issues raised by a defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen between them. It is only in plain and obvious cases, where a reasonable tribunal, without undertaking a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious, that a Court may be justified in refusing a stay.

The second course which is open to us is adherence to the settled approach that now prevails, by limiting the categories of cases in which a stay may be refused. A case falling within this limited category would be one in which fraud is pleaded. (see, *Malaysia Government Officers' Cooperative Housing Society Ltd. v. United Asia Investment Ltd. & Ors.* [1972] 1 MLJ 113.) The jurisprudence upon the established approach has been succinctly stated by Edgar Joseph Jr. SCJ (now FCJ) in *Seloga Jaya (supra),* in the following passage (at page 112 of the report):

> It is well known that if a party can satisfy the Court that the conditions for the grant of a stay under s. 6 of the Act are satisfied, it does not *ipso facto* follow that he will be entitled, as of right, to a stay, for the Court still retains a discretion to refuse it. But generally, as the Judge rightly recognized, the approach of the Court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oftquoted words of Martin B. in *Wickham v. Harding* [I859] 28 LJ Ex. 215, 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so'.

It is implicit in the foregoing passage that, given an agreement to arbitrate and the satisfaction of the conditions set out in s. 6 of the Act, a Court should lean towards the grant of a stay. This, in our judgment is the correct approach. The residual discretion which the Court retains is limited to a very narrow class of cases, such as those involving fraud or where there is, on a proper construction of the arbitration clause, no dispute, that falls within its purview or where the third party procedure under the rules of Court will most probably be resorted to. In the last of these situations, it is trite that an arbitrator has no jurisdiction to order third party proceedings.

We are aware of the law's reluctance to create or recognise categories or classes of cases in the realm of the exercise of judicial discretion. But in the area of the law with which we are presently concerned, it is a necessary evil to which resort must be had to ensure that development takes place in an orderly fashion.

Returning now to the facts of the present case, we are satisfied that there was abundant evidence before the learned Judge disclosing a dispute upon each of the three issues raised by Encik Zainur Zakaria in argument. We agree with Counsel that there was lacking in this case a proper appreciation of the affidavit evidence on the aforesaid issues. In our judgment the learned Judge applied the wrong test and asked himself the wrong question when he held that there was no bona fide dispute between the parties. Indeed, we are of opinion that the learned Judge went too far and was clearly wrong when he held that there must be a ***bona fide*** dispute for the s. 6 of the Act to bite. In our view a dispute or difference, whether *bona fide* or not would suffice.

It is settled law that in an appeal such as this, where all that we are concerned with is the exercise of discretion by a Court to whom the primary decision making power is entrusted, the initial function of this Court is one of review only. It has no original discretion of its own to exercise. Only after it has been demonstrated to a conviction that the High Court has committed one or more of those errors which would entitle appellate interference does this Court become seised of an original discretion of its own. This is a case which falls within the latter category and is accordingly one in which this Court is entitled to exercise an original discretion of its own.

Having considered the facts most carefully, and applying the relevant law to those facts, we are satisfied that discretion should be exercised in favour of the appellant. Accordingly, the appeal was allowed, the order of the learned Judge was set aside and the respondent's action was ordered to be stayed. The appellant was also awarded the costs of this appeal.